

P.S., Appellant

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Orlando, FL, Employer**

Appearances:

Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

On October 9, 2019 appellant, through counsel, filed a timely appeal from a May 13, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 13, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP abused its discretion by denying authorization for right shoulder surgery.

FACTUAL HISTORY

On April 16, 2006 appellant, then a 47-year-old lead transportation security screener, filed a notice of recurrence (Form CA-2a) under OWCP File No. xxxxxx447,⁴ for medical treatment for bilateral shoulder pain as of April 15, 2006 due to constant movement of bags over a guardrail and onto a high conveyer system while in the performance of duty. On July 7, 2006 OWCP converted the recurrence claim to a traumatic injury claim, assigned OWCP File No. xxxxxx229. It accepted the claim for bilateral bicipital tendinitis on December 11, 2006.

On October 31, 2006 appellant underwent an OWCP-authorized left shoulder arthroscopy, complex superior labral tear from anterior to posterior (SLAP) repair, and arthroscopic decompression. On June 10, 2008 he underwent OWCP-authorized left shoulder arthroscopy and complex recurrent SLAP repair. On April 28, 2009 appellant underwent an authorized right arthroscopic SLAP repair and arthroscopic subacromial decompression. On July 5, 2013 he underwent OWCP-authorized left shoulder arthroscopy, subacromial decompression, and extensive intra-articular debridement with removal of small loose bodies and significant amounts of labral fraying. OWCP expanded the acceptance of the claim to include the additional conditions of bilateral acromioclavicular (AC) shoulder and upper arm sprain and bilateral sprain/superior glenoid labrum lesion of the shoulder and upper arm.

On November 15, 2017 appellant underwent OWCP-authorized left shoulder total arthroplasty.

A magnetic resonance imaging (MRI) scan of appellant's right shoulder dated April 2, 2018 demonstrated supraspinatus and infraspinatus tendinosis and an unremarkable AC joint. It also demonstrated moderately-severe osteoarthritis of the glenohumeral joint, which was a new finding compared to a previous study on January 27, 2009.

In a report dated May 22, 2018, Dr. Kevin D. Nowicki, a Board-certified orthopedic surgeon, examined appellant for complaints of right shoulder pain. On physical examination of the right upper extremity, he observed moderate anterolateral tenderness, mild limitation in strength, and a positive Neer test. Dr. Nowicki diagnosed chronic right shoulder pain and primary osteoarthritis of the right shoulder. He recommended a right shoulder total arthroplasty, explaining that appellant's right shoulder had not improved with intra-articular injection, and he had persistent chronic pain of the rotator cuff and moderately advancing right shoulder osteoarthritis.

On June 1, 2018 appellant requested authorization for right shoulder joint reconstructive surgery.

On June 7, 2018 OWCP referred the case file to a district medical adviser (DMA) in order to determine the medical necessity of the requested right shoulder joint reconstructive surgery. In

⁴ Under OWCP File No. xxxxxx447, OWCP accepted sprain of the left shoulder and upper arm due to a January 9, 2006 traumatic injury (Form CA-1). Appellant's claims have not been administratively combined.

a memorandum dated June 8, 2018, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical record, including Dr. Nowicki's May 22, 2018 report. He noted that the accepted conditions under appellant's claim were AC joint sprain, biceps tendinitis, and a SLAP lesion. The DMA opined that, while the right shoulder replacement appeared to be indicated by a surgical standpoint, the condition for which shoulder replacement was indicated, glenohumeral arthritis, had not been accepted as work related, and had not been caused or aggravated by previous work-related surgeries. He recommended that OWCP deny surgical authorization for the right shoulder replacement procedure.

On July 19, 2018 OWCP advised appellant that the proposed surgical reconstruction of his right shoulder could not be approved. It found that, as degenerative shoulder arthritis had not been accepted under this claim, and because none of the previous surgeries caused or aggravated the diagnosed degenerative arthritis, authorization was denied. OWCP requested that appellant submit a narrative report from his physician explaining how the degenerative right shoulder arthritis was causally related to the accepted traumatic injury. It advised him that, if he desired a formal decision with appeal rights, he should submit a written request.

In a progress note dated July 19, 2018, Dr. Nowicki examined appellant for continued complaints of right shoulder pain. On physical examination he observed moderate anterolateral tenderness, mild limitation in strength, and a positive Neer test. Dr. Nowicki diagnosed right shoulder pain and primary osteoarthritis of the right shoulder. He continued to recommend right total shoulder arthroplasty.

In a report dated August 17, 2018, Dr. Robert R. Reppy, an osteopath specializing in family medicine, noted that appellant's request for approval of surgical reconstruction of the right shoulder had not been approved because appellant's claim had not been approved for degenerative shoulder arthritis. On physical examination he noted unchanged shoulder range of motion, limited cervical range of motion, no gross edema, and intact sensation. Dr. Reppy diagnosed bilateral peripheral neuropathy of the upper and lower extremities, bilateral biceps tenosynovitis, bilateral torn shoulder labrums, and bilateral shoulder impingement syndrome. He recommended that appellant remain off work and continue physical therapy.

In a progress note dated August 21, 2018, Dr. Nowicki observed continued right shoulder pain. Results on physical examination of the right upper extremity were unchanged from the prior visit. Dr. Nowicki diagnosed right shoulder pain and primary osteoarthritis of the right shoulder. He opined that "[t]he right shoulder is arthritic in the current need for further treatment including total shoulder is [appellant's] original injury as well as a subsequent arthroscopy. Dr. Nowicki has had further degeneration now requiring a total shoulder."

On September 13, 2018 appellant again requested authorization for right shoulder joint reconstruction.

By decision dated September 25, 2018, OWCP denied appellant's request for authorization for surgical reconstruction of his right shoulder. It found that he had not submitted sufficient medical evidence, including a narrative medical report explaining how his degenerative arthritis was causally related to his April 15, 2006 traumatic injury or if the traumatic injury aggravated a preexisting condition, to support that the procedure was medically necessary to address the effects of a work-related injury.

In a progress note dated October 16, 2018, Dr. Nowicki observed continuing right shoulder pain, which waxed and waned in severity. He noted that appellant's right shoulder condition was unchanged on physical examination. Dr. Nowicki diagnosed right shoulder pain and primary osteoarthritis of the right shoulder. He administered an injection to the right shoulder to treat appellant's pain and tenderness.

On October 24, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a progress note dated November 13, 2018, Dr. Nowicki observed that the injection to appellant's right shoulder administered at the last visit had marginally reduced some of his symptoms. Appellant's diagnoses and results on physical examination of the right shoulder remained the same as in Dr. Nowicki's previous report.

In a follow-up report dated November 16, 2018, Dr. Reppy reviewed appellant's nerve conduction velocity (NCV) testing obtained on September 12, 2018 as well as results from a soft tissue sonogram. He diagnosed C8-T1 radiculopathy of the bilateral upper extremities, bilateral peripheral neuropathy of the upper and lower extremities, bilateral tenosynovitis, torn labrums of both shoulders, and bilateral shoulder impingement syndrome. Dr. Reppy recommended that appellant not return to work for the next four weeks and that he continue with physical therapy.

On December 11, 2018 Dr. Nowicki examined appellant and noted that the corticosteroid injection appellant received at the last visit provided minimal relief of symptoms. He reported that appellant's right shoulder remained symptomatic and was overall unchanged. Dr. Nowicki diagnosed right shoulder pain, primary osteoarthritis of the right shoulder, and noted that appellant would continue with physical therapy while awaiting authorization for right shoulder replacement surgery.

In a follow-up report dated December 21, 2018, Dr. Reppy noted that he had examined appellant for complaints of neck and bilateral shoulder pain. Appellant indicated that the pain was greatest coming from his neck. Dr. Reppy observed full shoulder range of motion on abduction. He diagnosed C8-T1 radiculopathy of the bilateral upper extremities, bilateral peripheral neuropathy of the upper and lower extremities, bilateral tenosynovitis, torn labrums of both shoulders, and bilateral shoulder impingement syndrome. Dr. Reppy prescribed lidocaine patches and recommended that appellant not return to work for the next four weeks.

On January 14, 2019 Dr. Nowicki examined appellant, noting that his right shoulder remained symptomatic and overall essentially unchanged. Appellant's diagnoses and results on physical examination of the right shoulder remained the same as in the previous report from Dr. Nowicki. A follow-up report on February 18, 2019 similarly found a symptomatic and unchanged right shoulder with the same diagnoses and results on physical examination.

The hearing before an OWCP hearing representative was held on March 6, 2019. The case record was held open for at least 30 days for the submission of additional evidence.

In a report dated March 8, 2019, Dr. Reppy noted appellant's complaints that appellant's right shoulder pain was worse than his left shoulder, and that appellant was unable to lift a pitcher of water with his arm fully extended. On physical examination of the right shoulder he observed decreased range of motion on abduction and internal rotation. Dr. Reppy's diagnoses remained

the same as in his prior report. He recommended that appellant not return to work for the next four weeks and he prescribed cyclobenzaprine.

In a follow-up report dated March 18, 2019, Dr. Nowicki found that appellant's right shoulder remained unchanged with the same diagnoses and results on physical examination as in his previous report.

On April 12, 2019 Dr. Reppy reviewed the results of appellant's NCV testing of the upper extremities obtained on March 13, 2019, which evidenced C8-T1 radiculopathy. On physical examination of the shoulders he observed poor internal rotation and abduction with some improvement on abduction. Dr. Reppy's diagnoses remained the same as in his prior report. He recommended a refill of Flexeril and lidocaine patches.

In an April 29, 2019 report, Dr. Nowicki observed moderate anterolateral tenderness, mild limitation in strength, and a negative Neer test of the right upper extremity. He diagnosed right shoulder pain and primary osteoarthritis of the right shoulder.

By decision dated May 13, 2019, an OWCP hearing representative affirmed OWCP's September 25, 2018 decision, finding that "[t]he record is devoid of rationalized medical evidence demonstrating that the recommended surgery is causally related to the 2006 work injury or its effects."

LEGAL PRECEDENT

Section 8103 of FECA⁵ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation.⁶ In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.⁷ OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.⁸

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁹

⁵ *Supra* note 2 at § 8103.

⁶ *Id.*, see also *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

⁷ *D.W.*, Docket No. 19-0402 (issued November 13, 2019); see also *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

⁸ *J.E.*, Docket No. 18-0228 (issued August 8, 2019); *Daniel J. Perea*, *id.*

⁹ *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007).

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁰ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹¹ In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.¹²

ANALYSIS

The Board finds that OWCP has not abused its discretion in denying appellant's request for right shoulder surgery.

Appellant's claim was accepted for bilateral bicipital tendinitis, bilateral AC shoulder and upper arm sprain, and bilateral sprain/superior glenoid labrum lesion of the shoulder and upper arm. On August 21, 2018 Dr. Nowicki opined that "[t]he right shoulder is arthritic in the current need for further treatment including total shoulder is [appellant's] original injury as well as a subsequent arthroscopy. [Appellant] has had further degeneration now requiring a total shoulder." To be of probative value, a physician's opinion on causal relationship should be one of reasonable medical certainty.¹³ Dr. Nowicki did not explain how and why the requested surgery was necessary to treat appellant's accepted conditions.¹⁴ Furthermore, he did not explain, with medical rationale how the additional condition of right shoulder primary osteoarthritis was causally related to the accepted April 15, 2006 employment injury. The Board has held that conclusory opinions are insufficient to meet a claimant's burden of proof to establish a claim.¹⁵ Dr. Nowicki's statement on August 21, 2018 lacks the necessary specificity and detail such to constitute rationalized medical evidence on causal relationship. As such, this report is of diminished probative value, and is insufficient to establish that the requested surgical procedure was medically necessary due to the accepted employment injury.¹⁶

By contrast, in a memorandum dated June 11, 2018, a DMA reviewed the medical record, including Dr. Nowicki's May 22, 2018 report. He noted that the accepted conditions under appellant's claim were an AC sprain, biceps tendinitis, and a SLAP lesion. The DMA opined that, while the right shoulder replacement appeared to be indicated by a surgical standpoint, the condition for which shoulder replacement was indicated -- glenohumeral arthritis -- had not been accepted as work related, and had not been caused or aggravated by previous work-related surgeries. He recommended that OWCP reject surgical authorization for the right shoulder replacement procedure. The Board finds that the DMA provided a well-reasoned opinion

¹⁰ See *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 203, 209 (1992).

¹¹ *Id.*; see also *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹² See *T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹³ See *C.B.*, Docket No. 18-1712 (issued April 17, 2019); *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁴ *Supra* note 9.

¹⁵ *J.O.*, Docket No. 19-0326 (issued July 16, 2019).

¹⁶ *M.M.*, Docket No. 19-0563 (issued August 1, 2019); *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

explaining that appellant did not meet the criteria for the proposed total right shoulder total arthroplasty, as the condition indicating that the procedure had not been accepted as work related.¹⁷ As such, the DMA's opinion represents the weight of the medical evidence.¹⁸

The remainder of Dr. Nowicki's reports and the reports of Dr. Reppy did not address whether the requested right shoulder total arthroplasty was medically necessary and causally related to the accepted employment injury.¹⁹ Similarly, the diagnostic reports of record did not address this issue.²⁰ The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value.²¹ Therefore, these reports and notes are insufficient to establish that the requested surgical procedure should be authorized.²²

The Board finds that OWCP did not abuse its discretion in denying authorization for the proposed right shoulder total arthroplasty.²³ As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.²⁴ As none of the medical evidence explained how the proposed surgery was medically necessary and causally related to the accepted conditions under this claim, the Board finds that OWCP acted reasonably in denying appellant's request for authorization for right shoulder surgery.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying authorization for right shoulder surgery.

¹⁷ See *A.S.*, Docket No. 19-0745 (issued October 10, 2019).

¹⁸ See *id.*; *M.M.*, Docket No. 19-0491 (issued August 14, 2019); *N.M.*, Docket No. 18-1584 (issued March 15, 2019).

¹⁹ See *K.W.*, Docket No. 18-1523 (issued May 22, 2019).

²⁰ See *J.M.*, Docket No. 17-1688 (issued December 13, 2018).

²¹ See *C.B.*, Docket No. 18-1712 (issued April 17, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

²² See *id.*

²³ See *supra* note 16.

²⁴ *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board